Jennifer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, deceased) v Timothy Theseira

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–201 OF 2005
BALIA YUSOF J
16 DECEMBER 2008

Tort — Damages — Personal injuries — Special damages — Subrogation — Repatriation costs and hospitalisation charges — Whether learned sessions judge erred when refusing claim for failure to plead categorically — Whether learned sessions judge failed to scrutinise pleading as well as nature of evidence adduced

Tort — Damages — Road accident — Fatal accident — Dependency claim — Loss of support — Multiplier — Assessment of — At time of his demise, deceased was 68 years old — Whether entitled to claim for loss of support — Civil Law Act 1956 s 7(3)(iv)(a)

The appellant (plaintiff) sued the respondent (defendant) in her own capacity and as executrix of the estate of her deceased husband, Bernard Alfred Harper. Her claim against the respondent arose out of an accident which occurred on 19 February 1998 at Jalan Batu Ferringhi, Penang within the proximity of the Golden Sands Hotel. The accident involved a collision between the respondent who was riding a motorcycle and the appellant's husband, a pedestrian. As a result of the accident the deceased suffered serious injuries to his brain and succumbed to his injuries. The deceased, at the time of his death was 68 years old and was bedridden for nine months from the date of accident until his death. At the time of the accident, both the appellant and the deceased were tourists and staying at the Golden Sands Hotel, Batu Ferringhi, Penang. The accident occurred while the deceased was crossing the road and the respondent was riding his motorcycle towards Georgetown. The appellant contended that the accident was caused wholly by the respondent's negligence in riding his motorcycle at excessive speed and in pure disregard of other road users in the vicinity, including the deceased. The respondent in his evidence stated that while he was negotiating a bend, a pedestrian suddenly appeared crossing the road and was right in the middle of the road. Being too close, he panicked and lost control of his motorcycle and collided with the deceased. The learned sessions court judge found the respondent 100% liable for the accident and awarded the appellant damages for pain and

suffering in the sum of RM150,000, damages for nervous shock in the sum of RM10,000 and agreed special damages in the sum of RM37,365. Against these findings, the appellant appealed against the decision of the learned sessions judge in disallowing her claim for loss of support in the aggregate sum of £208,656.20 and special damages in respect of repatriation costs in the sum of £27,101.30, medical expenses incurred at Southampton Hospital, United Kingdom and St Richard's Hospital, United Kingdom in the aggregate sum of £45,575 and at Gleneagles Hospital, Penang in the sum of RM46,607.20. The respondent cross-appealed against the finding of 100% liability and against the award of RM150,000 as general damages for pain and suffering.

Held, allowing the appellant's appeal in part with costs and dismissing the respondent's cross-appeal:

(1) The mandatory words in the proviso to s 7(3)(iv)(a) of the Civil Law Act 1956 are crystal clear and must be given effect in its plain literal meaning. The purpose of enacting such provision is to bar speculation and awards in cases involving individuals who have attained the age of 55 years. No provision is made in respect of a multiplier where the deceased was above the age of 55. To adopt the multiplier of 16 years as suggested by the appellant was definitely going against the grain of the provision (see para 15).

(2) The learned sessions court judge had been very simplistic in her dealing with the subject matter of subrogation. She had not sufficiently directed her mind on the matter as evident from her rejection of dealing with it by concluding that it was not pleaded. The appellant's claim had been sufficiently pleaded in the statement of claim. During the trial, oral and documentary evidence were adduced furnishing the court with particulars of the expenses incurred and this evidence was never challenged by the respondent. To say that the appellant had failed to plead subrogation would in the circumstances of this case be erroneous (see paras 20–21).

Observation:

There is certainly a need for a reasoned and speaking judgment. The advantage of 'speaking' judgment needs no emphasis. The court would always urge trial judges to make every possible effort to produce well reasoned and 'speaking' judgments, but then, due to so many constrains, that may not be possible now. Trial judges are too preoccupied with far too many cases and judgments to write. They no longer have the luxury of time to produce well researched and authored judgments. Time has really changed. The pressure of work and the demand for quicker and speedier justice has created this dilemma among trial judges. Clearing the backlog of cases has become the

top priority with the result that judges nowadays tend to give short and over simplistic non-speaking judgments. This is something which must be viewed with grave concern. This has to be resolved.

[Bahasa Malaysia summary

Perayu (plaintif) telah mendakwa responden (defendan) atas kapasitinya sendiri dan sebagai wasi kepada harta pusaka mendiang suaminya, Bernard Alfred Harper. Tuntutannya terhadap responden timbul daripada satu kemalangan yang berlaku pada 19 Februari 1998 di Jalan Batu Ferringhi, Pulau Pinang berhampiran dengan Hotel Golden Sands. Kemalangan yang melibatkan perlanggaran di antara responden yang menunggang motorsikal dengan suami perayu, pejalan kaki. Akibat daripada kemalangan tersebut, si mati mengalami kecederaan otak yang serius dan mati disebabkan kecederaan tersebut. Si mati, ketika kematiannya berusia 68 tahun dan terlantar sakit selama sembilan bulan dari tarikh kemalangan hinggalah kematiannya. Semasa kemalangan, kedua-dua perayu dan si mati adalah pelancong dan tinggal di Hotel Golden Sands, Batu Ferringhi, Pulau Pinang. Kemalangan berlaku ketika si mati sedang melintas jalan dan responden menunggang motorsikal menuju ke Georgetown. Perayu menegaskan bahawa, kemalangan berlaku keseluruhannya adalah disebabkan oleh kecuaian responden yang menunggang motorsikalnya melebihi kelajuan dan langsung tidak menghiraukan pengguna jalan di kawasan sekitar, termasuk si mati. Responden di dalam keterangannya menyatakan bahawa semasa dia melepasi selekoh, seorang pejalan kaki dengan tiba-tiba muncul menyeberangi jalan dan berada betul-betul di tengah jalan. Disebabkan terlalu dekat, dia panik dan hilang kawalan motorsikalnya dan berlanggar dengan si mati. Hakim mahkamah sesyen yang bijaksana memutuskan bahawa responden bertanggungan 100% atas kemalangan dan mengawardkan perayu gantirugi untuk kesakitan dan penderitaan sejumlah RM150,000, ganti rugi untuk kejutan saraf sejumlah RM10,000 dan ganti rugi khas yang dipersetujui sejumlah RM37,365. Berdasarkan keputusan tersebut, perayu merayu terhadap keputusan hakim sesyen yang bijaksana yang tidak membenarkan tuntutannya untuk kehilangan sara hidup sejumlah £208,656.20 dan gantirugi khas berkenaan dengan kos repatriasi sejumlah £27,101.30, perbelanjaan perubatan yang ditanggung di Hospital Southampton, United Kingdom dan Hospital St Richard, United Kingdom sejumlah £45,575 dan Hospital Gleneagles, Pulau Pinang sejumlah RM46,607.20. Responden merayu balas terhadap keputusan 100% bertanggungan dan terhadap award sebanyak RM150,000 sebagai ganti rugi am bagi kesakitan dan penderitaan.

Diputuskan, membenarkan sebahagian rayuan perayu dengan kos dan menolak rayuan balas responden:

(1) Perkataan mandatori di dalam peruntukan s 7(3)(iv)(a) Akta

Undang-Undang Sivil 1956 adalah jelas dan mestilah dilaksanakan di dalam maksudnya yang jelas literal. Tujuan penggubalan peruntukan sedemikian adalah untuk menghalang spekulasi dan award di dalam kes-kes yang melibatkan individu yang telah mencapai umur 55 tahun. Tiada peruntukan dibuat berkaitan dengan pendarab di mana si mati adalah melebihi umur 55 tahun. Untuk menggunakan pendarab 16 tahun seperti yang dicadangkan oleh perayu adalah pastinya bertentangan dengan peruntukan tersebut (lihat perenggan 15).

(2) Hakim mahkamah sesyen yang bijaksana adalah terlalu ringkas dalam menguruskan perkara subrograsi. Beliau tidak mengarahkan mindanya dengan secukupnya seperti mana yang jelas daripada penolakannya daripada berurusan dengannya dengan memutuskan bahawa ianya tidak diplidkan. Tuntutan perayu adalah diplidkan dengan secukupnya di dalam pernyataan tuntutan. Ketika perbicaraan, keterangan lisan dan dokumentari dikemukakan memberikan mahkamah dengan butiran-butiran perbelanjaan yang ditanggung dan keterangan ini langsung tidak dicabar oleh responden. Untuk menyatakan bahawa perayu telah gagal memplidkan subrograsi di dalam keadaan kes ini adalah satu kesilapan (lihat perenggan 20–21).

Pemerhatian:

Sesungguhnya memang perlu satu penghakiman yang munasabah dan nyata. Kelebihan penghakiman yang 'nyata' tidak memerlukan penekanan. Mahkamah selalu menggesa hakim-hakim bicara melakukan usaha yang sewajarnya untuk menghasilkan penghakiman yang begitu munasabah dan 'nyata', tetapi, disebabkan begitu banyak halangan, perkara tersebut adalah tidak berkemungkinan sekarang ini. Hakim bicara terlalu banyak kes dan penghakiman yang perlu ditulis. Mereka tidak lagi mempunyai banyak masa untuk menghasilkan penghakiman yang diselidik dan ditulis dengan baik. Masa telah berubah. Tekanan kerja dan permintaan untuk mempercepatkan keadilan telah mencipta dilema ini di kalangan hakim-hakim. Menyelesaikan kes-kes tertangguh menjadi keutamaan yang menyebabkan hakim-hakim sekarang ini lebih cenderung memberikan penghakiman yang pendek dan lebih mudah. Ini adalah sesuatu yang mesti diambil perhatian. Perkara ini mestilah diselesaikan.]

Notes

For cases on personal injuries, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 236–238.

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 240–243.

Cases referred to

Abdul Aziz bin Alla Pichai v Fan Chin Siang @ Fun Kim Siong [1997] MLJU 123, HC (refd)

Clarke v Edinburgh & District Tramways Co Ltd 1919 SC (HL) 35 (refd)
Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465, CA (refd)
Eng Thye Plantation Bhd v Lim Heng Hock & Ors [2001] 4 MLJ 26; [2001] 4 CLJ 245, CA (refd)
Ganda Edible Oils Bhd v Aik Heng Hung Sdn Bhd [1983] CLJ Rep 562, HC (refd)
Greenfield v London and North Eastern Railway Company [1945] KB 89, CA (refd)
Hashim bin Abu Hassan (suing as the legal parent and dependant of Zahari bin Hashim, deceased) & Ors v Lee Cheng Chuan & Ors [2006] 1 MLJ 297, HC (refd)
Hang Jong Juan v Tan Yeo Soon [1986] 2 MLJ 5, CA (refd)
Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153, CA (refd)
Johari bin Khalid & Anor v Mohamad Zamri bin Khalid & Anor [1985] 1 MLJ 142, FC (refd)
Kementerian Pertahanan Malaysia & Anor v Malaysian International Shipping Corp Bhd and another suit [2003] 2 MLJ 226, HC (refd)
Lee In Fong & satu lagi lwn Zahara Johan [1992] MLJU 48; [1992] 1 CLJ 479, HC (distd)
Lim Joo Chiang v Lim Siew Choo & Anor [1955] MLJ 201, PC (refd)
Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam [1993] 2 MLJ 474; [1993] 3 CLJ 161, HC (refd)
Morley v Moore [1936] 2 KB 359, CA (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Rothmans of Pall Mall (M) Bhd v Neo Kim Har & Anor [1988] 3 MLJ 478; [1989] 2 CLJ (Rep) 404, HC (refd)
Sin Hock Soon Transport Sdn Bhd & Anor v Low King Ban [2006] 3 MLJ 174; [2006] 5 CLJ 265, HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Superintendant of Lands and Surveys (4th Div) v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Tan bin Hairuddin dan satu lagi lwn Bayeh Belalat [1990] 2 CLJ 775, HC (refd)
Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89, CA (refd)
Tan Kuan Chuan v Chandu Nair [1991] 2 MLJ 42; [1991] 1 CLJ 682, SC (refd)
Teo Kim Kien & Ors v Lai Sen & Anor [1980] 2 MLJ 125, FC (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
Ward v Malaysia Airlines System Bhd [1991] 3 MLJ 317, SC (refd)

Legislation referred to

Civil Law Act 1956 ss 7(3)(iv)(a), 28A(2)(c)

JJ Chan (Sezleeza bt Azli with him) (Shearn Delamore & Co) for the appellant.
Tharumarajah (Anantharajah Shanmugam with him)(Azim Tunku Farik & Wong) for the respondent.

Balia Yusof J:

FACTS

[1] The appellant (plaintiff) sued the defendant in her own capacity and as executrix of the estate of her husband Bernard Alfred Harper, deceased. Her claim against the defendant arises out of an accident which occurred on 19 February 1998 at about 1.20pm at Jalan Batu Ferringhi, Penang within the proximity of the Golden Sands Hotel. The accident involved a collision between the respondent who was riding a motorcycle and the plaintiff's husband, a pedestrian. As a result of the accident Mr Bernard Alfred Harper suffered serious injuries to his brain and succumbed to his injuries on 9 November 1998.

[2] At the time of the accident both the appellant and her husband were tourists and staying at the Golden Sands Hotel, Batu Ferringhi Penang. The accident occurred while Mr Harper was crossing the road and the respondent was riding his motorcycle towards Georgetown.

[3] The appellant contends that the accident was caused wholly by the respondent's negligence in riding his motorcycle at excessive speed and in pure disregard of other road users in the vicinity, including Mr Harper. In her evidence at the George Town Sessions Court, the appellant testified that just before the accident, she and Mr Harper were at a mini market opposite the Golden Sands Hotel buying same bananas for lunch. As they left the mini market, whilst the appellant had stopped to glance at some postcards at the stall outside the said mini market, Mr Harper had proceeded to cross the road first. While the appellant was about to cross the road after glancing at the post cards, she noticed that Mr Harper was already three quarter way across the road and she heard the revving of an engine coming from her left but could not see anything. She then saw Mr Harper suddenly jumping towards the pavement and upon looking to her left, she saw the respondent negotiating the bend at a speed of approximately 70–80km/hour. The respondent then collided into Mr Harper without swerving or braking about two feet from the pavement of the road on the side of the Golden Sands Hotel. The scene of the accident was at a sharp corner.

[4] The respondent in his evidence stated that while he was negotiating the corner, a pedestrian suddenly appeared crossing the road and was right in the

middle of the road. Being too close, he panicked and lost control of his motorcycle and collided with the deceased. He was riding at about 50km/hour and further testified that the scene of the accident is at a sharp corner and by the time he saw the deceased, he was about one meter from the deceased and unable to take any evasive action.

[5] The deceased suffered severe head and brain injuries and were hospitalised for nine months at the Gleneagles Hospital, Penang and was subsequently transferred to Southampton Hospital and St Richard's Hospital in the United Kingdom. Other injuries suffered by the deceased according to the consultant surgeon at the Gleneagles Medical Centre, Penang are:

(i) left frontoparietal acute subdural hematoma;

(ii) left temporal intra cerebral hematoma;

(iii) contusion of both frontal lobes and left temporoparietal lobes;

(iv) comminuted fracture of the shaft of the left fibula; and

(v) fracture outer third of shaft of the left clavicle.

[6] At the time of death, the deceased was 68 years old and was bedridden for nine months from the date of accident until his death.

[7] The learned sessions court judge had on 29 July 2005 found that the respondent was 100% liable for the accident and had awarded the appellant damages for pain and suffering in the sum of RM150,000, damages for nervous shock in the sum of RM10,000 and agreed special damages in the sum of RM37,365.

[8] In her findings, the learned sessions judge made the following findings of fact:

(i) the respondent was wholly negligent in causing the accident;

(ii) the respondent was certainly careless and did not give proper due care and attention while riding the motorcycle;

(iii) the respondent should have known that there is a high probability of people crossing the road at the area of the accident;

(iv) the respondent should have been aware of the deceased's presence while he was taking the bend and had all the room he needed to avoid colliding into the deceased; and

(v) the respondent was clearly riding the motorcycle too fast in the circumstances of the case.

[9] Against these findings, the appellant/plaintiff is appealing against the decision of the learned sessions judge in disallowing her claim for loss of support in the aggregate sum of GBP208,656.20 and special damages in respect of repatriation costs in the sum of GBP27,101.30, medical expenses incurred at Southampton Hospital, United Kingdom and St Richard's Hospital, United Kingdom in the aggregate sum of GBP45,575 and at the Gleneagles Hospital, Penang in the sum of RM46,607.20.

[10] The respondent's/defendant's cross appeal is against the finding of 100% liability and against the award of RM150,000 as general damages for pain and suffering.

CLAIMS FOR LOSS OF SUPPORT

[11] The appellant's claim for loss of support is based on the deceased's sources of income from various annuity and pension payments which in turn were the sources of financial support enjoyed by the appellant during the lifetime of Mr Harper. Some of the annuity and pension payments had been reduced, and some had ceased entirely upon Mr Harper's untimely death.

[12] Briefly, the particulars of the various annuity and pension payments are as follows:

(a) Annuity payments from the Equitable Life Assurance Society' in respect of two policies, ie, Policy No ANN0012803 and Policy No ANN0013088:

Prior to his death, Mr Harper had purchased the said life annuity policies at a capital sum which entitled him to annuity payments during his lifetime. These annuity payments had ceased upon his death.

(b) Pension payment from GA Life:

During the course of his employment with GA Life, Mr Harper had contributed to a pension scheme administered by GA Life. During retirement and prior to his death, he was receiving monthly pension payments from GA Life. After his death, GA Life had continued to pay the monthly pension to the appellant at a reduced rate.

(c) Pension payment from Cookson:

During the course of his employment with Cookson, Mr Harper had contributed to a pension scheme administered by Cookson. During retirement and prior to his death, he was receiving monthly pension payments from Cookson. After his death, Cookson had continued to pay the monthly pension to the appellant at a reduced rate.

(d) National Health Insurance Scheme:

During the course of his employment, Mr Harper had contributed to the National Health Insurance Scheme. During retirement and prior to his death, he was receiving a weekly government pension. After his death, Mr Harper's government pension payment had ceased altogether.

[13] It is the contention of the appellant that these various amount received by the deceased during his lifetime are not earnings and s 7(3)(iv)(a) of the Civil Law Act 1956 does not apply to the plaintiff's claim under the heading of loss of earnings.

[14] Learned counsel for the appellant relies on the case of *Lee In Fong & satu lagi lwn Zahara Johan* [1992] MLJU 48; [1992] 1 CLJ 479 and contends that appellant's claim is not based on 'loss of earnings' but on the pension and annuities which the deceased had enjoyed prior to his death. According to the appellant the annuity payments were extinguished upon the death of the deceased but continued to receive a reduced amount of the Cookson and GA Life pension schemes. It was based on this reduced amount that the loss of the plaintiff's earnings is calculated.

[15] Learned counsel for the respondent on the other hand submits that the appellant's claim under this heading is caught by the said provision of s 7(3)(iv)(a) of the Civil Law Act 1956. In essence, it means that the appellant is not entitled to claim for loss of support because the deceased was at the time of his demise above the age of 55 years. He was 68 years old at the time of his death. Learned counsel cited two cases for reference of this court namely, *Tan bin Hairuddin dan satu lagi lwn Bayeh Belalat* [1990] 2 CLJ 775 and *Abdul Aziz bin Alla Pichai v Fan Chin Siang @ Fun Kim Siong* [1997] MLJU 123. Both these authorities deal with s 28A(2)(c) of the Civil Law Act 1956 which deals with the subject matter of award of damages for loss of earnings in respect of plaintiffs who are above the age of 55 years. The Legislature has prohibited the award of such damages for that category of persons and as such the appellant is not entitled to her claims. For the sake of brevity, I do not propose to reproduce those provisions but suffice it to say that the two provisions are in pari materia as stated by the learned sessions judge in her grounds of judgment. The words of the Legislature are clear and the court need not go further than applying those words used in the legislation. It is only in cases where the intention of the Legislature is not clear that this court will embark on the process of interpreting the law (see *Tan Kuan Chuan v Chandu Nair* [1991] 2 MLJ 42; [1991] 1 CLJ 682. The mandatory words in the proviso to s 7(3)(iv)(a) of the Civil Law Act 1956 are crystal clear and must be given effect in its plain literal meaning. The purpose of enacting such provision is to bar speculation and awards in cases involving individuals who has attained the age of 55 years. No provision is made in

respect of a multiplier where the deceased is above the age of 55. To adopt the multiplier of 16 years as suggested by the appellant is definitely going against the grain of the provision.

[16] I pause here to consider the decision in *Lee In Fong*'s case which rule that pension is considered not an earning, which decision was affirmed by the Supreme Court. Having perused the grounds of judgment of the learned sessions judge, I am inclined to agree with her reasons in distinguishing that case with the present case before me. Reading her grounds as enumerated at pp 55 and 56 of the record of appeal and her reasons for following the decisions in *Tan bin Hairuddin dan satu lagi lwn v Bayeh Belalat* and *Abdul Aziz bin Alla Pichai v Fan Chin Siang*, I need not go further than saying that the distinction is appreciable.

[17] Learned counsel for the respondent has also taken the initiative to enlighten this court on the various dictionary meaning of 'earnings', 'annuity' and 'pension' as no definition of earnings is provided for in the Act. At the same time counsel also refers to the evidence given by the appellant regarding the fact that her husband 'had bought annuity', 'had invested money to purchase annuity' and 'had paid into a fund to enable him to purchase annuity when he retires'. The appellant had also given evidence that the annuities and pension which her husband received were subject to tax. I further agree with the submissions of the learned counsel for the respondent that the documentary evidence made available before the learned sessions court judge are not consistent with the proposition to show that those payments received by the deceased were in fact pensions. Exhibits P51A-C, exhs P52 A-B and exh P59 show the taxability of the pension payment in respect of the GA Life, Cookson and the National Health Insurance Scheme respectively. This clearly goes to show that what the deceased received which are called annuities and pensions are actually earnings. I pause here to note that what the widow in *Lee In Fong*'s case received was pension per se but not the appellant in the instant case.

[18] In the light of the foregoing reasons, I see no justification to disturb the findings made by the learned sessions judge with regard to the dismissal of the appellant's claim for loss of support. The appellant's appeal on this ground must fail.

REPATRIATION COSTS AND HOSPITAL EXPENSES

[19] I shall now consider the appellant's appeal against the decision of the learned sessions judge in disallowing the claim for special damages in respect of expenses incurred for repatriation costs and hospitalisation charges both in Penang and in England. The amount claimed by the appellant are in respect

of medical expenses at the Gleneagles Medical Centre Penang totalling RM46,007.20, repatriation costs to England in the sum of £27,101.30 and medical expenses at the Southampton Hospital and St Richards Hospital, England totalling £45,575. These claims were dismissed by the trial judge on the ground that the appellant has failed to plead subrogation and she relied on the case of *Kementerian Pertahanan Malaysia & Anor v Malaysian International Shipping Corp Bhd and another suit* [2003] 2 MLJ 226. In the said case, Vincent Ng J held that subrogation is a material fact that must be pleaded and the failure to do so is fatal to the suit.

[20] With the greatest respect, I think the learned sessions court judge has been very simplistic in her dealing with the subject matter of subrogation and the failure of the plaintiff to plead such. It is not disputed that the appellant has been requested by Norwich Union, the insurer, to recover the expenses incurred by them. These expenses were made and incurred directly as a result of the accident. The appellant is suing in her own capacity as a dependant of the deceased as well as on behalf of the estate of the deceased in her capacity as the executrix. On perusal of the statement of claim, I am of the view that the appellant's claim had been sufficiently pleaded at pp 83–85 of the record of appeal. During the trial, evidence were adduced by way oral and documentary giving the particulars of the expenses incurred and this evidence were never challenged by the respondent. To say that the appellant has failed to plead subrogation would in the circumstances of this case be erroneous. The evidence before the court is very clear and certainly the failure of the appellant to categorically plead that the items claimed are based on the principle of subrogation is not fatal to her case. I do not see any magic in the word subrogation, and in that respect, the learned sessions court judge has erred in concluding that there is a failure to plead in the instant case. The issue which must be foremost in one's mind is whether the respondent here is being taken by surprise by the evidence adduced. In the instant case not only the facts of the claim were pleaded, there is also no radical departure from the general pleadings of the appellant in the evidence adduced at the trial. Courts of this country has always permitted cases to go on with unpleaded facts if it find that the evidence adduced does not form a radical departure from the pleadings but a mere development of the case. But that is not the case here (see *Superintendant of Lands and Surveys (4th Div) v Hamit bin Matusin & Ors* [1994] 3 MLJ 185). The respondent was certainly not taken by surprise and was in no way prejudiced by the evidence adduced on the so called claim based on the principle of subrogation. It is also not open to the respondent to challenge the evidence now when they are deemed to have waived or inherently consented to when such evidence was adduced without objection earlier.

[21] Still on the issue of subrogation, I found that the learned sessions court judge has not sufficiently directed her mind on the matter as evident from her rejection of dealing with it by concluding that it was not pleaded. From the line of authorities submitted by the respondent in particular the cases of *Rothmans of Pall Mall (M) Bhd v Neo Kim Har & Anor* [1988] 3 MLJ 478; [1989] 2 CLJ (Rep) 404; *Ganda Edible Oils Bhd v Aik Heng Hung Sdn Bhd* [1983] CLJ Rep 562; *Lin Lin Shipping Sdn Bhd v Govindasamy Mahalingam* [1993] 2 MLJ 474; [1993] 3 CLJ 161 and *Teo Kim Kien & Ors v Lai Sen & Anor* [1980] 2 MLJ 125, it is clear that the case of *Kementerian Pertahanan Malaysia & Anor v Malaysian International Shipping Corp Bhd* is clearly distinguishable and was decided without reference to those authorities. In dismissing the appellant's claim under this heading, the learned sessions court judge relied solely on this authority for the proposition on the need to plead but she has totally failed to scrutinise the pleading itself as well as the nature of evidence adduced. There is a serious flaw in her judgment and it must be corrected. There is merit in the appellant's counsel's submissions that there is sufficient pleading on the claim under this heading and coupled with that, evidence were adduced and were not challenged by the respondent. This court was further referred to the case of *Sin Hock Soon Transport Sdn Bhd & Anor v Low King Ban* [2006] 3 MLJ 174; [2006] 5 CLJ 265 which dealt with the issue of whether medical expenses duly paid by the insurer were claimable by the insured. The High Court in that case applied the principles in *Ward v Malaysia Airlines System Bhd* [1991] 3 MLJ 317 and held that the fact that the insurer had paid for such medical expenses were irrelevant and that the insured was accordingly entitled to be compensated by the defendant therein. The court went on to say that the insured should not be penalised for his prudence and foresight in taking out an insurance policy to protect his own life, permanent disability or medical expenses as a result of an accident. Similarly, in the case of *Morley v Moore* [1936] 2 KB 359 the Court of Appeal held that the plaintiff therein was entitled to claim for the whole amount of damages notwithstanding that a portion thereof had been settled by the plaintiff's insurers and notwithstanding the fact that the insurer had requested the plaintiff not to institute proceedings against the defendant for the recovery of such portion of damages settled by the insurers. The court further held that the plaintiff would hold the amount to the extent of the sum received from the insurers as trustee for them, they being subrogated to his rights.

[22] In the circumstances, the appeal on this ground is hereby allowed and the decision of the learned sessions judge on the issue of subrogation be set aside.

THE RESPONDENT'S CROSS-APPEAL

[23] The respondent is cross-appealing on both the issues of liability and

quantum. The learned sessions court judge held the respondent to be 100% liable for the accident and has awarded the sum of RM150,000 as damages for pain and suffering to the appellant.

[24] On the issue of liability, I appreciate that this appeal is basically against the finding of facts made by the learned sessions court judge. As such the court would always be slow and reluctant to disturb such finding of facts unless it can be shown that such finding could not be sustained by having regard to the evidence made available before the trial judge (see *Johari bin Khalid & Anor v Mohamad Zamri bin Khalid & Anor* [1985] 1 MLJ 142, *Hashim bin Abu Hassan (suing as the legal parent and dependant of Zahari bin Hashim, deceased) & Ors v Lee Cheng Chuan & Ors* [2006] 1 MLJ 297). Principles involving appellate interference on finding of facts are well established and as an appellate court, I have to, at the outset, start on the working presumption that any decision appealed against is right in every respect. So to succeed the appellant must convince me that the decision appealed from is wrong (see *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214). Appellate courts do not make finding of facts but merely review the finding of primary facts made by the trial judge (see *Eng Thye Plantation Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26; [2001] 4 CLJ 245, *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545).

[25] The learned sessions judge who has heard and seen the witnesses has an advantage and is in a better position to assess the evidence before her, and that decision of hers is entitled to great respect (see *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153, *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465).

[26] Having perused the notes of evidence and the grounds of judgment, I see no reason how the decision of the learned trial judge can be faulted. She has considered the evidence in its entirety in coming to the decision that the respondent is wholly liable for the accident. Beside the defendant's own evidence of him panicking, losing control, '*pitam dan tidak sedar diri*', the condition of the area being a sharp corner and a tourist area, together with the evidence of the plaintiff, it is erroneous to suggest that the learned trial judge has failed to consider and appreciate fully the evidence before her. These are among the factors that she had considered in deciding the liability to be wholly on the defendant. The appeal against liability and the suggestion of apportionment of liability is hereby dismissed.

[27] On the issue of quantum, it is again well established that the onus on the appellant is a heavy one and it must be established that plainly, the trial

judge's award was a wholly erroneous estimate (see *Hang Jong Juan v Tan Yeo Soon* [1986] 2 MLJ 5). An appellate court should not give preference to its own figure simply because it disagree with the figure arrived at by the trial judge. Neither will the appellate court interfere and substitute its own figure just because it thinks that the figure awarded by the trial judge is lesser or greater than what it would have awarded (see *Lim Joo Chiang v Lim Siew Choo & Anor* [1955] MLJ 201). It is only in cases where it can be shown that the trial judge has acted on a wrong principle of law or has for some other reasons made a wholly erroneous estimate of the damage suffered can this court interfere with the award (see *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89, *Greenfield v London and North Eastern Railway Company* [1945] KB 89, *Topaiwah v Salleh* [1968] 1 MLJ 284).

[28] In so awarding the damages of RM150,000 for pain and suffering, the learned trial judge has taken into consideration the various medical reports in P7–P9 and P42–P44 as to the injuries and the level of consciousness and awareness of the deceased throughout the period in the various hospitals. Having made the finding that 'the deceased was not entirely in a state of coma though most of the time unconscious' and 'aware of surroundings' plus the fact of being bed ridden for nine months, is in the circumstances of the case sufficient justification for the trial judge to estimate the award. My perusal of the grounds of judgment reveals that the learned trial judge has directed her mind to the whole circumstances of the case. I must say that although her judgment may not be as perfect and detailed as what has been submitted and suggested by learned counsel for the respondent, I cannot even for a moment agree that the award made here is wholly erroneous or manifestly excessive in the circumstances of the case. I am not prepared to disturb the quantum of damages awarded by the learned sessions court judge and the appeal against that decision must fail. In so arriving at the figure of RM150,000 she has also considered the various authorities from past cases which she has relied on as a guide. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the court will follow (see *Topaiwah v Salleh*). There has not been any error of principle discerned in her judgment.

[29] Commenting again on the judgment of the learned sessions court judge, I am impelled to add that there is certainly a need for a reasoned and speaking judgment. The advantage of 'speaking' judgment needs no emphasis. On my part I would always urge trial judges to make every possible efforts to produce well reasoned and 'speaking' judgments, but then, due to so many constrains, that may not be possible now. Trial judges are too preoccupied with far too many cases and judgments to write. They no longer have the luxury of time to produce well researched and authored judgments. Time has really changed. The pressure of work and the demand for quicker

and speedier justice has created this dilemma among trial judges. Clearing the backlog of cases has become the top priority with the result that judges nowadays tend to give short and over simplistic non-speaking judgments. This is something which must be viewed with grave concern. This has to be resolved.

[30] In conclusion, the appeal by the appellant is hereby allowed in part in respect of her claims for special damages for repatriation costs and hospital expenses incurred at the Gleneagles Hospital, Penang, Southampton Hospital and St Richard's Hospital United Kingdom, while the appeal against the decision on the claim for loss of support is hereby dismissed. The respondent's cross-appeal on the issue of liability and against the award of RM150,000 for pain and suffering is also dismissed. Costs be awarded to the appellant. On the further issue of what rate of exchange would be applicable, I order that the award shall be in the sum as stated in the appellant's amended memorandum of appeal in encl 14, which is in Malaysian Ringgit.

Appellant's appeal allowed in part with costs and respondent's cross appeal dismissed.

Reported by Ashgar Ali Ali Mohamed